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In the Supreme Court of the United States

No. 907
October Term, 1969

UNITED STATES OF AMERICA,
Petitioner

v.

959.68 ACRES OF LAND IN MERCER COUNTY, PENNSYLVANIA

BRIEF OF RESPONDENT OPPOSING PETITION FOR CERTIORARI

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Question Presented

BRIEF OF RESPONDENT OPPOSING PETITION FOR CERTIORARI

QUESTION PRESENTED

"Where the original plans in connection with the Shenango River Project (approved in 1957 by the Army Engineers and authorized by Congress in 1938 with funds appropriated on September 10, 1959) provided for land acquisition below elevation 920 for reservoir purposes, which included 106 acres of a 237 acre tract (and the owner was so advised by various government representatives), does the subsequent condemnation of the entire 237 acre tract by the government in 1965, by virtue of a change in policy in 1961 to include the remaining portion with other additional areas for recreational purposes, which was not contemplated in the original plans, entitle the owner to the enhancement value of the 131 acres above elevation 920 from the date of the project to the date the additional 131 acres were added to the project?"

COUNTER-STATEMENT OF THE CASE

In 1938, Congress authorized the Shenango River Reservoir Project in Western Pennsylvania; 52 Stat. 1215. On June 25, 1957, the Chief of Engineers gave final approval to a General Design Memorandum containing overall plans and cost estimates for the project (A. 63).

On June 25, 1965, the government condemned 237 acres of respondent's land, being Tract 333, in connection with the project. The land in question consisted of 106 acres below, and 131 acres above elevation 920.

The original plans comprehended the acquisition in fee or easement of all lands in reservoir basin below elevation 920 (A. 59) and included a number of public facilities as shown on Plate 10 of General Design Memorandum (A. 60). The public facilities, including specific recreational facilities, were clearly delineated on the plan, none of which were located on the 131 acres of respondent's land above elevation 920.

On September 10, 1959, the government became committed to the project by virtue of an act of Congress, 73 Stat. 491 appropriating funds pursuant to the plans.

When land acquisition was instituted, the owners of Tract 333 were advised by various government representatives that none of the land above elevation 920 would be taken and that the owners could continue to utilize the same for any purpose they saw fit (A. 97, 104, 110, 113-116).

In 1961, the government changed its policy and decided to add additional land to the project (A. 85), which consisted of two new public use sites, neither of which included respondent's land. (See Design Memorandum No. 5, Preliminary Master Plan, approved April 24, 1961, Gov. Ex. No. 2, A. 83, 84).

The enhancement question of one of the sites was involved in *United States v. 172.80 Acres in Mercer County, Pennsylvania,* 350 2d 957 (3rd Cir. 1965), which ruled in favor of the owner, Totten, relying on the rules laid down in *United States v. Miller,* 317 U.S. 369.

On May 14, 1963, the government again changed its plans by adding three new public use sites which included the respondent's 131 acres above elevation 920 (A. 68-72, 98, 99).

The additional five sites were defined in Design Memorandum No. 3, Part III, Real Estate approved October 20, 1961 (A. 72); Supplement No. 1 of Design Memorandum dated April 30, 1962 (A. 73) and corrected Design Memorandum No. 3, Part III, Real Estate (Gov. Ex. No. 5) approved July 3, 1963, the latter of which included the respondent's 237 acres above and below elevation 920 (A. 73, 74).

The trial before a jury to ascertain just compensation took place April 29, through May 2, 1968. By agreement of the parties and upon instruction by the District Court, the jury returned two verdicts, one for $121,200.00, which took into account the enhancement of the 131 acres above elevation 920, and one for $95,000.00, which excluded any enhancement.

The District Court held that the documentary and uncontradicted oral evidence disclosed that the original

project, which did not include the 131 acres in question, became finalized when the government became committed to the project on September 10, 1959, and therefore, the acreage above elevation 920 was not within the probable scope of the project. Accordingly it held that the owners were entitled to damages for the enhancement value by virtue of the change in plans in July, 1963, and entered judgment in the full amount of the verdict of $121,200.00.

The Third Circuit Court of Appeals held that the instant case did not significantly differ from the *Totten* case and that in both cases it appeared that the incoming national administration of President Kennedy adopted a new policy of comprehensive development of recreational facilities in connection with the project which resulted in the unanticipated taking of the remainder of the tract in question. It further held that in both cases the trier of fact justifiably found that the project originally conceived, designed, described and undertaken by the government was not attended by the probability that parts of the tracts above 920 would be taken. The judgment of the District Court was affirmed on the basis of the *Miller* case (supra). The Petition for Certiorari should be dismissed for the reasons hereinafter set forth.

ARGUMENT

The reasons set forth by Petitioner in its Petition for Writ of Certiorari are without merit for the following reasons:

First: The scope of the project rule announced by this Court in the *Miller* case is not properly presented in *United States v. Reynolds,* October Term, 1969, No. 88 as alleged by Petitioner.

The primary question, if not the sole one, as it pertains to the instant matter presented in the *Reynolds* case was whether or not the jury should decide whether the land in question was within the scope of the project. The Sixth Circuit Court of Appeals stated (p. 306):

> "The (District) Court specifically wanted the jury to decide whether or not a recreational area was within the scope of the project prior to dealing with the monetary aspects. . . . Since the jury decided that the 78 acre tract was within the scope of the project from the beginning, it did not include in its award any value due to enhancement. Unless there is other error present, this Court will not overturn the verdict of the jury based on substantial evidence. . . ."

This ruling is in conflict with *Wardy v. United States,* 402 F. 2d 762, wherein it was held that the Court and not the jury was to determine the question.

Since the *Reynolds* case was reversed on other grounds and must be retried, the government is now seeking to

have this Court rule that on retrial the District Court and not the jury shall decide whether the land in issue was within the probable scope of the project.

The incidental question attempted to be raised in the *Reynolds* petition is not properly before this Court. The Petitioner in that case requests this Court to reinterpret the scope of the project test as it has evolved from the *Miller* case. The substantive issue of the scope of the project was not squarely decided by the Court of Appeals in *Reynolds* and thus is not a matter properly to be considered by this Court.

The Petition for Certiorari in *Reynolds* in this latter respect does not comply with the provisions of Supreme Court Rule 19(1-b).

The *Reynolds* case is not analogous for the reason that counsel for both sides in the instant case agreed that the question relating to the scope of the project was under the law and evidence a matter for the Court to determine.

Second: The cases cited in the *Reynolds* petition, *United States v. First Pyramid Life Ins. Co.*, 382 F. 2d 804, and *United States v. Crance*, 341 F. 2d 161, certiorari denied, 382 U.S. 815, are not in conflict with the instant case and *United States v. 172.80 acres of land, etc. (Totten)*, 350 F. 2d 957.

The *Miller* rule does not require reinterpretation.

Crance, unlike *Totten* and the instant case, was within the probable scope of the project when the master plan for recreational purposes was finalized. Originally the *Crance* 35 acres were included in the first design memorandum for reservoir purposes. In October, 1953, the gov-

ernment established a new land acquisition policy revising downward the amount of land to be taken from the *Crance* property. From its inception the project contemplated recreational facilities as an integral part thereof. The first design memorandum in 1953 included the *Crance* property. Maps were prepared by the district and area engineers which approved eight sites excluding the *Crance* property for recreational purposes. Public hearings were then held and thereafter it was included. With reference to the approved eight sites the Court said (p. 164):

> "First, this was not a final plan. It was not until later in 1957 that an engineer was selected to prepare a master plan for recreational purposes. . . . To hold, in effect, on a project of this kind that simply because this particular tract was not delineated on the map at the time of appropriation of funds for the project by Congress, it had been excluded, would be giving undue weight to the proposed diagram of the reservoir plan. . . . Not until the reservoir lines are finalized, can there be a practical determination as to the number and location of the necessary recreational sites. . . . The property condemned (35 acres) was taken during construction from an area of probable acquisition for fulfillment of a recreational purpose which was within the scope of the project from its inception."

In *First Pyramid* it was held that since the original plan contemplated a relocation of the city water facilities the site of which was not specifically delineated, the land condemned being contiguous to the facilities and the only logical area for relocation, was within the probable scope of the project.

Argument

The present case can be differentiated for the reasons that the final plan was approved by the Chief of Engineers on June 25, 1957, and specific recreational sites clearly delineated. The final plan not only did not include land above elevation 920 but the record discloses that the government publicly stated and represented to the owners that the 920 elevation was the boundary line of the project.

Thus we have a complete project clearly finalized, designating the boundary of the project and the specific locations of the recreational areas which did not include the property in question. It was only after the incoming national administration of President Kennedy that a new policy of comprehensive development of recreational facilities was adopted which resulted in the unanticipated taking.

In view of the government's policy change the District Court and the Third Circuit correctly held that the land in question was not within the probable scope of the original project.

It is evident that in *Crance* and *First Pyramid* no policy changes were involved; that all the proceedings prior to acquisitions related to the preparations incident to the completion of the master plans; and which when finalized included the properties in question. Unlike the instant case those cases held, under the *Miller* rule, that the properties were properly within the probable scope of the project.

The Petitioner ostensibly desires this Court to change the long standing *Miller* rule. The decided cases disclose no valid reasons for this Court to do so. Just compensation envisages the requirement that owners be compensated for the fair market value for the taking of their

property and this includes enhancement damages to property not considered to be within the probable scope of the original project. In *Miller*, Your Honorable Court said (p. 377):

> "The question then is whether the respondent's lands were probably within the scope of the project from the time the government was committed to it. *If they were not, but merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement.*" (Italics supplied.)

CONCLUSION

The 131 acres above elevation 920 of the owner's 237 acres condemned by the government on June 25, 1965, were not within the probable scope of the project on September 10, 1959, when the project was finalized. Thus, under the *Miller* rule enunciated by this Court and applied in the District Court and the Court of Appeals the enhancement value was correctly included in the jury verdict and the judgment of $121,200.00 entered by the District Court.

Therefore for the reasons heretofore set forth the Petition for Certiorari should be dismissed.

Respectfully submitted,
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